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No. 1265

In the Supreme Court of the United States

OCTOBER TERM, 1946

H. C. JONES, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

THE LIBERTY GLASS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Acting Solicitor General, on behalf of the Collector of Internal Revenue, prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered January 21, 1947, affirming the judgment of the District Court for the Western District of Oklahoma.

OPINIONS BELOW

The opinion of the District Court (R. 18–24) is reported in 66 F. Supp. 254. The opinions in the Circuit Court of Appeals (R. 29–36) are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 21, 1947. (R. 36.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether claims for refund of income taxes must be filed within two years after the payment of the tax, as provided by Section 322 (b) of the Internal Revenue Code, or within four years after the payment of the tax, as provided by Section 3313 of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment, shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within

two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U. S. C. 322.)

SEC. 3313. PERIOD OF LIMITATION UPON REFUNDS FOR CREDITS.

All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years

immediately preceding the allowance of the refund.[1] (26 U. S. C. 3313.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.322–7. LIMITATIONS UPON THE CREDITING AND REFUNDING OF TAXES PAID.—(a) *General rule.*—Unless a claim for credit or refund of an overpayment is filed within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, the Commissioner is prohibited from allowing or making a credit or refund of income tax imposed by chapter 1 for such year after both periods have expired.[2] * * *

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[1] The taxes here involved are income taxes for the taxable year 1938. Income taxes for taxable years beginning prior to January 1, 1939, remain subject to the statutory provisions in effect prior to the Code. Section 1 of the Internal Revenue Code (26 U. S. C. 1). However, Section 322 (b) of the Revenue Act of 1938, and Section 3228 (a) of the Revised Statutes as it read in 1938 are the same as Section 322 (b) and Section 3313 of the Code, and there is no material difference in the statutory situation in effect in 1938 and under the Code so far as the argument here made is concerned. Moreover, the taxpayer relied upon Section 3313 of the Code in its claim for refund and has continued to rely upon it. In view of all this, it is believed that confusion is avoided and ease of reference facilitated by discussing Section 322 (b) and Section 3313 of the Code as the statutes involved.

[2] Insofar as pertinent Section 19.322–7, as amended by T. D. 5256, 1943 Cum. Bull. 550, Regulations 103, promulgated under the Internal Revenue Code, and Article 322–7, Regulations 101, promulgated under the Revenue Act of 1938, are similar to the foregoing provisions.

STATEMENT

The facts shown by the pleadings (R. 1–16), and the stipulation of facts (R. 16–18) were found by the District Court (R. 19–21) and may be summarized as follows:

The taxpayer is an Oklahoma corporation doing business in Oklahoma. (R. 16.) After having obtained an extension of time, the taxpayer on June 15, 1939, filed its corporation income and excess profits tax return for the calendar year 1938, which disclosed a taxable net income of $9,058.90 and indicated a total liability of $1,193.25, which amount was duly paid in 1939. (R. 17.) An additional assessment of $158.53 was also paid in 1939. (R. 17.) Neither the original tax nor the additional tax mentioned is involved in this action.

Subsequent to the filing of the return and the first additional assessment, an investigation of the taxpayer's income tax liability was made by a revenue agent, and this resulted in the assessment of additional tax in the amount of $7,992.59, and of this amount, after it was reduced for amounts previously paid, $6,640.81 remained due and was paid on March 8, 1941. (R. 17.) In the computation of this additional tax, certain adjustments were made, to none of which the taxpayer takes exception in this case. (R. 5–13, 17–18.)

On March 30, 1944, the taxpayer filed a claim for refund of $1,053.49, on the ground that during the year 1938, the taxpayer paid sums aggregating $75,191.78 on indebtedness of the corporation within the meaning of Section 27 (a) (4) of the Revenue Act of 1938, c. 289, 52 Stat. 447, and that the taxpayer was entitled to credit for such payments in an amount equal to two and one-half percent of its adjusted net income, or $1,053.49, and that failure to allow such credits was erroneous. (R. 5–13, 18.) The taxpayer stated in the claim that it was relying on the four-year limitation period provided in Section 3313 of the Internal Revenue Code. (R. 5–13.) The claim was rejected by the Commissioner of Internal Revenue under date of June 23, 1944, by a letter in which it was pointed out that Section 3313 of the Code specifically exempts from its application income, war-profits, excess profits, estate and gift taxes. (R. 13–14, 18.)

It was expressly stipulated that under the applicable revenue law, the taxpayer was required to file a corporation income and excess profits tax return for the taxable year 1938. (R. 17.)

On December 4, 1945, the Collector filed a motion to dismiss the complaint and for judgment on the pleadings (R. 16), which was overruled by the District Court on April 3, 1946 (R. 24), judgment entered on April 18, 1946 (R. 24–25), and the Circuit Court of Appeals for the Tenth

Circuit affirmed (R. 29–31) with Judge Huxman dissenting. (R. 32–36.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that claims for refunds of erroneous assessments of income taxes are governed by the limitation provisions of Section 3313 of the Internal Revenue Code.

2. In holding that Section 322 (b) of the Internal Revenue Code is not applicable to refund claims based on erroneous assessments of income taxes.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The court below has decided a question of general importance arising under the federal revenue laws which should be finally determined by this Court. The importance of the question presented, involving, as it does, the great mass of claims for refund of income taxes, is manifest.

The holding below that a four-year period rather than a two-year period of limitation applies in cases of this character greatly impairs the value to the Government of the statute of limitations which this Court recently characterized as "an almost indispensable element of fairness as well as of practical administration of an income tax policy." *Rothensies* v. *Electric Stor-*

age Battery Co., No. 48, this Term, decided December 16, 1946, slip sheet, p. 4. Cases dependent on the answer are now pending in the Court of Claims and in District Courts in all the circuits except the Fourth and Eighth, and the problem is an ever-recurring one.[3] A decision of this Court on the question at this time will prevent much useless litigation, as many more cases will undoubtedly arise.

2. The decision is plainly incorrect and inconsistent with the intent of Congress as disclosed by the two sections and their legislative history. Section 3313 of the Internal Revenue Code expressly provides that the limitation provisions of that section are intended to govern claims for refund of all taxes "*except* as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." Section 322 (b), on the other hand, expressly provides the limitation period for filing claims for refund of income, war-profits and excess profits taxes.[4] The court below nevertheless held that the four-year limitation applies to this case.

The decision rests upon the fact that Section

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[3] These cases involve approximately $200,000. This sum, however, is no measure of the amount of refunds that would have to be made if this decision is permitted to stand, because of the recurring nature of this question.

[4] Section 910 and Section 1027 of the Internal Revenue Code govern estate and gift taxes, respectively.

322 (a) uses the word "overpayment" and upon a supposed distinction between an "overpayment" of tax, which is supposed to result from errors occurring in the preparation of the return, and an "erroneous or illegal assessment or collection" made under color of legal authority. As a result of this construction Section 322 was held inapplicable to claims for refund of income taxes alleged to have been erroneously assessed and collected. Since Section 3313 establishes a four-year period after the payment of tax, whereas Section 322 fixes a two-year period, the claim filed in this case (more than two but less than four years after payment of the tax) was held to be timely.

The decision thus reads into the sections an ambiguity which is not in any way justified by the language used. There is nothing in the word "overpayment" which excludes from its meaning an overpayment made because the tax was erroneously or illegally assessed. The reason for the inclusion in the Internal Revenue Code of more than one section establishing limitations on the filing of refund claims is made necessary not by the distinction drawn by the court below but by the separate treatment provided throughout the Code for income, profits, estate and gift taxes as distinguished from those known as "Miscellaneous" and "Excise, Import, and Temporary" taxes. (See Subtitle B, Internal Revenue Code, Chapters 6–28, and Subtitle C, Internal Revenue Code,

Chapters 29–33.)[5] Such separate treatment is based upon broad considerations of legislative and administrative convenience and necessity, and is interwoven with the elaborate but separate growth of these various kinds of taxes. On this point we believe that the arguments made by Judge Huxman in his dissenting opinion below are persuasive and should have been accepted by the court below. (R. 34–35)

The decision below is also contrary to clear evidence of Congress' understanding of these sections as far back as 1923. The then Secretary of the Treasury in a detailed letter addressed to the Chairman of the House Ways and Means Committee (Appendix, *infra*) asked that the forerunner of Section 322 (Section 252 of the Revenue Act of 1921, c. 136, 42 Stat. 227) be amended so that the period of limitations for filing claims for refund of *erroneous or illegal assessments of income taxes* would commence when the tax was paid and not only, as the section then provided,

[5] Examples of such separate treatment for income, profits, gift and estate taxes may be found in the following sections of the Code: Sections 322, 871 and 1012 conferring jurisdiction in the Tax Court over such taxes; Section 3777 providing for review by the Joint Committee on Internal Revenue Taxation of refunds authorized in excess of $75,000; Section 3801, providing for certain mitigation of the statute of limitations in income tax cases; Section 3804 (1) (A), (B) and (C), extending the time for filing returns, making payment, or filing Tax Court petitions in respect of such taxes; Section 3807, extending the period of limitations for income and profits taxes.

on the date the return was due. The amendment, thus modifying the *income tax section*, was duly enacted.[6]

If the forerunner of Section 3313 (Section 3228 (a), Revised Statutes) were applicable to erroneous assessments there would have been no need for such an amendment since in the latter section the period of limitations did commence on the date the tax was paid. The explanatory letter of the Secretary of the Treasury was embodied in the House Committee Report[7] as its explanation of the need for the amendment of the income tax section, and the Senate Finance Committee adopted the House Report as its own.[8] It is submitted that this evidence of the understanding of the Congress and the Treasury is well-nigh conclusive.[9] The majority opinion below, without analysis, simply held that they "do not think it [the legislative history] necessarily supports the contention" of the Government. (R. 31.)[10]

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[6] Act of March 4, 1923, c. 276, 42 Stat. 1504.

[7] H. Rep. No. 1424, 67th Cong., 4th Sess., p. 2 (1939-1 Cum. Bull. (Part 2) 848, 849–850).

[8] S. Rep. No. 1137, 67th Cong., 4th Sess., p. 1 (1939-1 Cum. Bull. (Part 2) 848).

[9] Additional evidence of the understanding of the draftsmen of the Revenue Act of 1924, to the same effect, is found in the statement of Dr. Gregg. Statement of the Changes Made in the Revenue Act of 1924 by H. R. 6715 and the Reasons Therefor, Senate Committee Print, 68th Cong., 1st Sess., March 6, 1924, p. 37.

[10] The court relies in part on *Huntley* v. *Southern Oregon Sales*, 102 F. 2d 538 (C. C. A. 9th), which, after detailing

3. The decision here overturns a long established administrative practice which, until comparatively recently, had not been challenged. In many cases the controlling effect of Section 322 (b) was assumed without question. See, e. g., *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *Garbutt Oil Co.* v. *United States*, 89 F. 2d 749 (C. C. A. 9th); *United States* v. *Bibb Mfg. Co.*, 73 F. 2d 367 (C. C. A. 5th); *Pelham Hall Co.* v. *Carney*,

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the legislative history (*except* for the Reports on the 1923 amendment and the 1924 Statement which were not called to its attention by the Government's brief) concluded there was nothing therein to assist in resolving the apparent conflict between the two sections, and rationalized a distinction based upon those who are required to file returns and those who are wholly exempt. As to the latter, it was thought that taxes assessed and collected were erroneous and illegal. Although the decision was believed to be erroneous, certiorari was not requested in the absence of a conflict and because the problem had not assumed general importance at the time. *United States* v. *Lederer Terminal W. Co.*, 139 F. 2d 679 (C. C. A. 6th), also held in favor of a taxpayer, and although citing *Southern Oregon* disregarded the rationale of that case and held that Section 3313 governed taxpayers, whether required to file returns or not, whose income taxes were erroneously collected. For the same reasons as in the *Southern Oregon* case, the Government did not apply for certiorari. *Kavanagh* v. *Noble* (C. C. A. 6th), decided February 11, 1947, held the *Lederer* case to be controlling. Certiorari is being applied for simultaneously with the present application. *In re Tindle's Estate*, 59 F. Supp. 667 (E. D. Pa.) affirmed *per curiam sub nom. Pennsylvania Co. etc.* v. *United States*, 152 F. 2d 757 (C. C. A. 3d), turned on another issue, and on the question here presented, since it involved estate taxes, is so patently wrong as to be wholly unreliable as a precedent. *Central Hanover Bank & Trust Co.* v. *United States*, 67 F. Supp. 920 (S. D. N. Y.), supports the Government's position.

111 F. 2d 944 (C. C. A. 1st); *Cf. United States* v. *Frauenthal*, 138 F. 2d 188 (C. C. A. 8th); *Rosenman* v. *United States*, 323 U. S. 658. *Huntley* v. *Southern Oregon Sales*, 102 F. 2d 538 (C. C. A. 9th), the first case in which the question was raised, was not decided until 1939 and was thought to be of narrow application. *United States* v. *Lederer Terminal W. Co.*, 139 F. 2d 679 (C. C. A. 6th), was decided in November 1943. See footnote 10.

The Treasury Regulations issued under every Revenue Act since 1924 have contained only one article dealing with time limits on claims for refund of income taxes and have provided that they be filed within the time prescribed in Section 322 (b), or its predecessors. The language of Regulations 111, Section 29.322–7, quoted *supra*, is found in almost identical terms in all income tax regulations since Regulations 94, promulgated under the Revenue Act of 1936.[11] This administrative interpretation[12] has been unwavering.

[11] Section 19.322–7 of Regulations 103 (1939), Article 322–7 of Regulations 101 (1938) and Regulations 94 (1936); *Cf.* Article 322–7 of Regulations 86 (1934), Article 1257 of Regulations 77 (1932) and Regulations 74 (1928), Article 1305 of Regulations 69 (1926), and Article 1307 of Regulations 65 (1924).

[12] See, for example, Treasury Form 843 (Revised April 1940), on which all claims for refund of income and other taxes must be filed. This form requires the Collector to indicate which one of the three types of claims the taxpayer has filed: (1) Refund of Tax Illegally Collected, (2) Refund of Amount Paid for Stamps Unused, or Used in Error or Ex-

Yet, without mention or discussion of this factor, the opinion below decides the question directly contrary to this long standing administrative practice.

4. The effect of the decision below is to cast serious doubt upon the right of the Commissioner of Internal Revenue to pay interest on refunds of income taxes erroneously assessed or collected. The only statutory provision which permits the payment of interest on refunds is Section 3771 (a) of the Internal Revenue Code, which provides that—

> Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

If it is true that overpayments of taxes are different from erroneous or illegal collections of taxes, then there is no authority to be found anywhere in the Internal Revenue Code permitting the payment of interest on the refund of the latter types of collections.[13] Not only does the result appear to be the reverse of what would be expected, but it is contrary to the unchanged administrative practice. Interest has always

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cess, and (3) Abatement of Tax Assessed (not applicable to estate or income taxes). There is no place to designate so-called "overpayments."

[13] *Rosenman* v. *United States*, 323 U. S. 658, 663: "Exaction of interest from the Government requires statutory authority * * *." *Cf. Huntley* v. *Southern Oregon Sales*, 104 F. 2d 153 (C. C. A. 9th).

been paid on all refunds, regardless of what caused the payment of such sum by the taxpayer in the first instance. And "it will not do to treat the same transaction as [over]payment and not as [over] payment, whichever favors" the taxpayer. *Cf. Rosenman* v. *United States, supra,* p. 663.

5. Perhaps an even more important result of the distinction drawn by the court below would be in the limitation it would impose upon the jurisdiction of the Tax Court. In any case where a deficiency in income taxes has been determined and the taxpayer has filed a petition for review, subsection (d) of the very section here in question (Section 322) gives jurisdiction to the Tax Court to find that a taxpayer "has made an overpayment of tax." The result of the decision below is to limit the Tax Court's jurisdiction to make such findings to only those cases where the excessive payment results from an error made on the return. No jurisdiction would exist in the harsher situation, one which more obviously calls for relief to the taxpayer, where the payment of the tax arose from the Commissioner's erroneous or illegal assessment. Such a serious limitation upon the jurisdiction of the Tax Court could only be justified on the basis of a statutory command in the most express language. Yet all available evidence of the legislative intent clearly points to a contrary result.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

APRIL 1947.

APPENDIX

H. Rep. No. 1424, 67th Cong. 4th Sess., pp. 1, 2–3 (1939–1 Cum. Bull. (Part 2) 848)

The Committee on Ways and Means, to whom was referred the bill (H. R. 13775) to amend the revenue act of 1921 in respect to credits and refunds, having had the same under consideration, reports it back to the House without amendment and recommends that the bill do pass:

In order that the changes proposed by the bill may clearly appear the original text of section 252 of the revenue act of 1921 is set out below, the proposed changes being indicated in italics; the part in italics being new matter added:

> Sec. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes,

or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer, *or unless before the expiration of one year from the time the tax was paid a claim therefor is filed by the taxpayer:*

* * * * *

Concerning the proposed bill the following letter has been received from the Treasury Department:

TREASURY DEPARTMENT,
Washington, January 13, 1923.

HON. WILLIAM R. GREEN,
Acting Chairman, Committee on Ways and Means,
House of Representatives.

MY DEAR MR. GREEN: I have your letter of January 12, requesting any comments that I may care to offer with reference to a bill, H. R. 13775, "To amend the revenue act of 1921 in respect to credits and refunds."

The proposed bill amends section 252 of the revenue act of 1921 in two respects: First, by providing that a refund or credit of income, war-profits or excess-profits taxes may be made if claim therefor is filed by the taxpayer with one year from the time the tax was paid even though not filed within five years from the time the return was due, and, second, by providing that where a tax is erroneously or illegally col-

lected from a withholding agent the refund shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

Section 252 of the revenue act of 1921 provides that no credit or refund of income, war-profits or excess-profits taxes shall be allowed after five years from the date when the return was due unless before the expiration of such five years a claim therefor is filed by the taxpayer. Section 3228 of the Revised Statutes, as amended by section 1315 of the revenue act of 1921, provides that a claim for the refunding or crediting of any internal-revenue tax erroneously or illegally collected must be presented to the Commissioner of Internal Revenue within four years after the payment of such tax. The present ruling of the Treasury Department is that section 252 of the revenue act of 1921 and section 3228 of the Revised Statutes should be read together, and that a refund or credit of income, war-profits or excess-profits taxes erroneously or illegally collected may be made if claim therefor was filed within four years after the tax was paid although not within five years after the return was due. The necessity for a provision allowing the filing of a claim within a given period after the tax is paid, even though not within five years after the return was due, is apparent. In the case of an additional assessment of income, war-profits or excess-profits taxes after the expiration of the five-year period from the time when the return was due, which is permissible in cases where the taxpayer has waived his rights under the statute of limitations, such assessment would be final

when made and the taxpayer would be barred from filing a claim for refund even to form the basis for a suit at law for the recovery of the taxes paid. The existing ruling of the Treasury Department, allowing a taxpayer to file a claim within four years after the tax is paid even though not within the five-year period after the return was due, is of very doubtful legality, and consequently it is deemed advisable to clarify the situation by means of legislation, and provide unequivocally that a claim for refund or credit may be considered by the Department if filed within a given period after the tax was paid even though not within five years from the time the return was due.

For the reasons stated above I approve the proposed bill amending the revenue act of 1921 both as to form and as to substance.

Yours very truly,

A. W. MELLON,
Secretary.

The purpose and effect of the bill is very clearly shown in the letter of the Secretary of the Treasury set out above. The committee concurs in the reasoning of the Secretary as to the necessity of making the law definite so that the taxpayer who has, by agreement with the Treasury, permitted the time for the final assessment of the taxes due from him to be made after the expiration of the five-year period, will not be barred from making a claim for a refund when such assessment is made and the taxpayer alleges that the assessment is illegal. While the Treasury Department is now permitting this to be done as a matter of common justice, the legal right to do so is questionable.

The committee believes that it is not necessary that the taxpayer should have four years after such a payment had been made and considers one year sufficient. That amount of time is accordingly given by the bill to the taxpayer after the payment in which to make his claim for a refund.

* * * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1947